COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

The Berkshire Gas Company) D.T.E. 01-56

APPEAL OF DECISION OF THE PRESIDING OFFICER ON THE DIVISION OF ENERGY RESOURCES' MOTION TO STRIKE THE TESTIMONY OF DR. KENNETH GORDON

Pursuant to 220 CMR 1.06(d) 3., the Massachusetts Division of Energy Resources ("DOER") herein appeals the decision of the Presiding Officer denying DOER's Motion to Strike the testimony of Dr. Kenneth Gordon (the "Motion") in the above action.

Background

On October 11, 2001, during the course of the evidentiary hearing on the Berkshire Gas Company's (the "Company") Petition for Rate Increase brought under G.L. c. 164?

94, DOER brought its Motion. On October 12, 2001, the Presiding Officer denied the Motion, stating that the Department's practice as to testimony, expert opinion and otherwise, was to view the matter holistically. The ruling, entered less than twelve hours after DOER filed its Motion and without response or opposition from the Company, simply ignores the facts of the case and the relevant evidentiary standards applicable to expert testimony.

Argument

The Presiding Officer Failed to Apply the Rules of Evidence Observed by the Courts, As Prescribed by 220 CMR 1.10(1).

As set forth in DOER's Motion, a copy of which is attached hereto and specifically incorporated herein by reference, Dr. Kenneth Gordon provided his expert opinion

concerning the proposed price cap mechanism ("PCM") filed as part of the Company's Performance Based Ratemaking Petition under G.L. c. 164 ? 94. Taking his prefiled testimony and live testimony as a whole, Dr. Gordon was not sufficiently acquainted with the specific facts of the Company's PCM to render an expert opinion. The testimony of one of the Company's other witnesses, Robert M. Allessio, CEO of the Company, further reinforced that Dr. Gordon had been hired as an expert for the Company to provide the "overall philosophy and structure" of the Petition, not as an expert about the factual details of the PCM that would have provided the foundation, necessary as a matter of law, to support an expert opinion.

220 CMR 1.10(1) states, in relevant part, that "The Department shall follow the rules of evidence observed by courts when practicable... There shall be excluded such evidence as is... not of the kind on which responsible persons are accustomed to rely in the conduct of serious affairs."

As set forth in DOER's Motion, it must be established that an expert has sufficient knowledge of the particular facts of a case to bring his expertness meaningfully to bear.

Without laying that foundation, such an "expert opinion" is properly excluded. This common law standard is codified in the Massachusetts Evidentiary Standards, which provide, at Article VII. – Opinion and Expert Testimony, as follows:

703. Experts may base an opinion on:

- direct personal knowledge
- having heard the witnesses and seen the exhibits at trial
- a hypothetical question

 hearsay data if the data is independently admissible and of a type reasonably relied upon by experts in the field.

None of this factual foundation was provided in support of Dr. Gordon's testimony. In fact, the reverse was true, with Dr. Gordon himself testifying that he did not know if he had reviewed the final PCM filed with the Petition, only that he had reviewed a portion of a version of it. Dr. Gordon did not even know if the Company had filed a Service Quality Plan, which, pursuant to D.T.E. 99-84 (June 29, 2001) had to be filed with any Petition under G.L. c. 164? 94.

Looking at the Case "As a Whole" Fails to Provide the Foundation Necessary to Support Admission of an Expert Opinion When the Expert Lacks the Requisite Factual Information.

The opinions of experts are prescribed an amount of probative value and weight not afforded to lay opinion because they bring to the fact finder a unique degree of specialized knowledge. This weight and value presumes that the expert opinion is predicated upon a foundation of specific knowledge of the facts of the case.

While looking at the case "as a whole" may provide general direction and the basis for an overall assessment of the Petition, it does not allow the Department to ascribe special weight or value to Dr. Gordon's testimony. In fact, to admit an "expert opinion" without that foundation ubiquitously devalues the meaning of expert testimony. If the opinions of experts are to be credibly relied upon by the Department in rate proceedings, the requisite factual foundation must be provided. Lacking that foundation, expert opinion has no greater value, and therefore, no specialized purpose, as it cannot enhance or inform the decision-making process in the manner intended by the courts.

This is the first Performance Based Ratemaking Petition filed with the Department

following its June 29, 2001 decision in D.T.E. 99-84; *Investigation by the Department of*

Telecommunications and Energy on its own Motion to Establish Guidelines for Service

Quality Standards. The fact that Dr. Gordon did not even know if the Company had filed a

Service Quality Plan should, standing alone, be sufficient to exclude Dr. Gordon's "expert"

opinion. As an additive component to the other, significant gaps in his testimony, there

should have been no question about striking his "expert" opinion as to the specific facts of

the PCM.

Conclusion

For the above reasons, DOER appeals the decision of the Presiding Officer

denying the Motion and requests that the Commission:

1. Reverse the Presiding Officer's decision; and

2. Strike Dr. Gordon's opinion about the comprehensiveness and sufficiency of the

Company's PCM as filed.

Respectfully submitted,

Carol R. Wasserman
Deputy General Counsel

70 Franklin Street, 7th Floor

Boston, MA 02110

(617) 727-4732

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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The Berkshire Gas Company) D.T.E. 01-56

MOTION TO STRIKE THE TESTIMONY OF DR. KENNETH GORDON

As a preliminary matter, the Massachusetts Division of Energy Resources ("DOER"), while now filing and presenting its Motion to Strike ("Motion"), specifically requests that the Department <u>defer</u> ruling upon the Motion until the Department rules on the pending <u>Motion to Dismiss the Petition of the Berkshire Gas Company and in the Alternative to Bifurcate the Proceeding</u>, filed by the Attorney General on October 1, 2001 with the assent of DOER and endorsement of the Associated Industries of Massachusetts. The Department's ruling on the <u>Motion to Dismiss</u> could effectively render DOER's Motion moot, making further consideration by the Department unnecessary.

In accordance with 220 CMR 1.04 and 1.10(1), DOER moves to strike those portions of the testimony of Dr. Kenneth Gordon, offered as an expert opinion in support of the specific price cap mechanism proposed by the Berkshire Gas Company (the "Company") in the Petition filed with the Department pursuant to G. L. c.164? 94. In support of this Motion, DOER states as follows:

I. Facts Presented

Dr. Kenneth Gordon offered his expertise generally in the areas of performance based ratemaking and incentive regulation. This general testimony was offered, as described by counsel for the Company and by the Company's primary policy witness, Robert M. Allessio, to provide the larger philosophy and structure for this Petition; 10/3/01

Transcript, page 5, lines 5-8; 10/4/01 Transcript, page 194, lines 4-8. DOER has no quarrel with this general testimony and agrees that Dr. Gordon provided sufficient foundation to support his general expertise in these areas.

Dr. Gordon also provided his expert opinion as to the <u>specific price cap mechanism</u> proposed by the Company in the instant Petition. It is this testimony that DOER moves to strike. Dr. Gordon's testimony, as well as the testimony of Robert M. Allessio, demonstrate that Dr. Gordon had insufficient knowledge of the particular facts of the proposed price cap mechanism to support an expert opinion.

When asked whether he had received and reviewed the complete price cap proposal in this case, Dr. Gordon replied:

I certainly received a proposed plan. It was the subject of further discussion, and some changes were made over the course of the time that I prepared my testimony. I don't remember particularly which elements changed, but there were some changes. 10/3/01 Transcript, pages 19-20.

Dr. Gordon's own testimony makes it quite clear that the Company did not afford him the scope or the opportunity to sufficiently acquaint himself with the specific elements of the price cap mechanism so as to proffer an expert opinion:

- Q. Did you perform a productivity study for Berkshire Gas Company in preparation for your prefiled testimony in this case?
- A. I did not.
- Q. Have you ever performed a productivity study for Berkshire Gas Company?
- A. No. 10/3/01 Transcript, pages 23 24.
- Q. Dr. Gordon, did you make any analysis of the Berkshire Gas Company's costs to determine whether it was an average cost performer relative to other companies in the Northeast?
- A. I did not. 10/3/01 Transcript, page 55, lines 15 19.

Mr. Kaplan: The company is asking the Department to take a look now at what all the exogenous costs could be, make a determination now, and if that kicked in during the term year term, would the company need to come before us again and say, "Here's a problem. We need more money?" Or is this something that is pre-approved [exogenous costs] and as long as a certain amount of money is reached on the loss of revenues from the DSM programs, for example, it automatically goes into effect?

The Witness [Dr. Gordon]: I don't have a clear answer and maybe Ms. Zink can answer that question more in its specifics. At the general level my answer is that here is an activity that reduces profit, all things being equal, that you nevertheless want the company to engage in.

Mr. Kaplan: One that you want the Department to approve as an exogenous factor.

The Witness: The company would like the Department to approve it, yes. And as to exactly how the proceedings would be done, I'd ask you to direct that question to Ms. Zink. 10/3/01 Transcript, pages 106 – 108.

- Q. Can you identify for the purposes of this filing what was submitted as service quality performance measures and penalties?
- A. I believe that whatever was submitted, or if it has been submitted—I understand some of it may still be in progress. I've been informed by the company that they will submit standards that meet what the Department has set out as the standards...
- Q. For the purposes of this filing, are you aware of whether or not the company has filed a service quality plan?
- A. I'm not certain whether they have or haven't. My general point is that there should be such standards and the Commission should make sure they're in place, as part of this plan.
- Q. Is there another witness to whom I should be directing these questions? Mr. Avery: I would suggest Ms.Zink would be the appropriate witness for these questions.

The Witness: That's who I was going to suggest, too.

- Q. Just to make sure that I have this clear: Dr. Gordon, the purpose of your testimony on service quality mechanisms is limited generally to their application?
- A. Their necessity and the fact that any kind of a price cap plan should have that as a part of it. That's the broad point I try to make. And I don't try to make any points as to whether—you know, what the details--.
- Q. But your knowledge as to what has been filed in the Berkshire case is limited to what you've already stated: It's just general terms.
- A. Yes. I understand that they're working on it, that they're designing measures, that they're doing statistical work. And what portions of that they have submitted to the Department yet or not, I'm not certain, I haven't been involved in that process. 10/3/01 Transcript, pages 122 125.

- Q. Dr. Gordon, to your knowledge, was there any formal economic analysis conducted to establish the 31-month rate freeze period?

 A. Not to my knowledge. It was a judgment... 10/3/01 Transcript, page 137, lines 21 24.
- Q. Could we go to 1-57. Dr. Gordon, you state in this response to this information request that you didn't believe that it was cost-effective to perform a total-factor-productivity analysis. Could you provide any break-even analysis or cost/benefit analyses to support that assertion?

A. No. I didn't. It's kind of a gross comparison. 10/3/01 Transcript, pages 139 –140.

- Q. You testified earlier—that you preferred to defer to Ms. Zink on a lot of the details of the operation of the PCM.
- A. Yes, kind of the administrative, how it's calculated and when it's filed and that sort of stuff. 10/3/01 Transcript, page 151.

Throughout Dr. Gordon's testimony, he relies upon the specific facts underlying prior Department decisions to support his conclusions concerning the Company's price cap mechanism, lacking the specific factual information about this filing necessary to provide the foundation for an expert opinion on this filing. Dr. Gordon relies upon the Department's decisions in Nynex, Boston Gas, and Colonial Gas to support his conclusions concerning the productivity factor, the productivity offset, the accumulated inefficiencies component of the price cap formula, exogenous variables, and the consumer dividend. 10/3/01

Transcript, pages 27, 37, 40, 44, 71, 129 – 130. While the facts of these cases certainly provide precedent upon which to develop price cap mechanisms generally, knowledge of these cases cannot be substituted for knowledge of the specific proposal before the Department.

II. Foundation for Expert Opinion

Expert opinion is the product of specialized knowledge applied to the particular facts of the case in dispute. Thus, as foundation for expert opinion evidence, it must be established: (1) that the witness is qualified with special knowledge and (2) that he has sufficient knowledge of the particular facts to bring his expertness meaningfully to bear (emphasis added); Boston Gas Co. v. Assessors of Boston, 334 Mass 549, 573 - 575, 137 NE2d 462, 479-483 (1956). If a witness is to be allowed to testify as to his opinion, he must have sufficient familiarity with the particular facts to reach a meaningful expert opinion; Fourth Street Pub., Inc. v. National Union Fire Insurance Company, 28 Mass.App.Ct. 157, 547 NE2d 935 (1989); see also Liacos, Massachusetts Evidence 114 (1981), Giannasca v. Everett Aluminum, Inc., 13 Mass.App.Ct. 208, 211, 431 NE2d 596 (1982). Further, sufficient knowledge of the particular facts of a case must be based upon personal knowledge and not be obtained through inadmissible hearsay. H. H. Hawkins and Sons Co. v. Robie, 338 Mass 61, 153 NE2d 768 (1958).

Dr. Gordon testified that he had seen a proposal for the Company's price cap mechanism. He did not know if it was the proposal ultimately filed with this petition. He did not know if the proposal he saw was revised or changed prior to filing with this Petition. He testified that he generally believed that a ten year term was appropriate, but did not know why that term was selected for the specific price cap mechanism offered in this Petition. He further testified that he had no actual knowledge of the Company's accumulated inefficiencies, he had done no productivity studies, and he had no knowledge as to whether

a service quality plan had been prepared or filed.

Robert M. Allessio, the Chief Executive Officer and senior policy witness for the Company, testified that beyond Dr. Gordon's general recommendation against mid-period reviews, he could not recall any specific recommendation, comment, or proposal made by Dr. Gordon. He further testified that the Company had hired Dr. Gordon to provide his overarching philosophy and general expertise; 10/5/01 Transcript, pages 208 – 209.

Dr. Gordon, while clearly an expert generally, has little familiarity with the specifics of the proposed price cap mechanism. However, Dr. Gordon offered his expert opinion in his prefiled testimony, pages 30 – 31, lines 15 – 25, 1 – 3 that, "The Department should approve the plan that Berkshire has proposed. The incentive plan that would govern Berkshire's ratemaking makes sense, from the standpoints of both utility customers and shareholders, as a comprehensive whole. In my judgment, the Plan does meet this standard. Importantly, Berkshire's PCM would provide a much more solid foundation for providing benefits to consumers than would continuing with the *status quo*. Berkshire's PCM would provide strong efficiency incentives, price predictability and stability, and further the achievement of other important public policy goals."

Dr. Gordon's proffering of this opinion, in light of his own testimony and that of Mr. Allessio, is analogous to a reknowned orthopedic surgeon proffering an expert opinion about a patient's back pain without ever examining the x-rays.

The special knowledge of an expert is of no value unless it is brought to bear on the particular facts of the case in dispute. Without knowing those facts, it is impossible to offer such an opinion and any "expert" opinion so lacking in foundation is properly excluded.

Commonwealth v. Harrison, 342 Mass 279, 173 NE2d 87 (1961).

III. Conclusion

Accordingly, assuming the issue remains justiciable following the Department's ruling on the Motion to Dismiss, DOER moves to strike all testimony offered by Dr. Kenneth Gordon as an expert opinion relating to the price cap mechanism proposed by the Company in this proceeding.

Respectfully submitted,

Carol R. Wasserman Deputy General Counsel

Austin McHoul Assistant Counsel Massachusetts Division of Energy Resources 70 Franklin Street, 7th Floor Boston, MA 02110 (617) 727-4732